Filed 8/8/19 Tafoya v. L.A. Civil Service Com. CA2/2

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

| | |
|---|---|
| ALEX TAFOYA,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>LOS ANGELES CIVIL SERVICE COMMISSION,<br><br>Respondent;<br><br>COUNTY OF LOS ANGELES et al.,<br><br>Real Parties in Interest and Respondents. | B291623<br><br>(Los Angeles County Super. Ct. No. BS169235) |

APPEAL from a judgment of the Los Angeles Superior Court, Amy D. Hogue, Judge. Affirmed.

Rains Lucia Stern St. Phalle & Silver, Gidian R. Mellk for Plaintiff and Appellant.

Gutierrez, Preciado & House, Calvin House, Nohemi Gutierrez Ferguson, and Nicholas Weiss for Real Parties in Interest and Respondents.

******

A custodial officer working at a jail facility was discharged after he violated his department's rules about handling recalcitrant inmates and using reasonable force. The officer had engaged in similar misconduct on two prior occasions. The officer's administrative challenge to his discharge was rejected. The officer's petition for a writ of administrative mandamus was also rejected. We conclude that these rejections were appropriate and affirm.

## FACTS AND PROCEDURAL BACKGROUND

### I. Facts

#### A. *Background*

By June 2014, Alex Tafoya (petitioner) had been working for the Los Angeles County Sheriff's Department (the Department) for just over four years and, for nearly 10 years prior, for the Los Angeles County Office of Public Safety that was absorbed into the Department. In June 2014, petitioner was a Deputy Sheriff working at the Inmate Reception Center in downtown Los Angeles.

#### B. *The incident*

On the morning of June 12, 2014, petitioner was working with inmates housed in section 231 of the Inmate Reception Center, which has several large dorm rooms called "Pods," which are labeled alphabetically. Around 7 a.m. that morning, an inmate named Zuri Henley (Henley) flatly refused an order from custodial officers to get in line so he could be transported to court.

Instead, Henley "ran the rage" by cussing and flailing his hands. As required by Department policy, petitioner called for a sergeant to assist with Henley because his behavior qualified him as a recalcitrant inmate. Sergeant Raymond Cardenas (Sgt. Cardenas) responded to section 231, and Henley suddenly "settled down," became "composed" and was "extremely nice talking to the sergeant." Once Sgt. Cardenas determined that Henley did not have a court appearance that day, Henley was placed in Pod F. Once the sergeant left, Henley once again became disruptive.

Around lunch time, petitioner and another deputy were feeding the inmates in Pod F. As petitioner watched, the other deputy directed Henley to put on his shirt and to stand near the staircase in the pod, but he "refused to follow . . . instruction[]." Henley eventually complied, but as the lunch hour continued he vacillated between "moments when he was okay" and "other moments" when he would "egg[] . . . on and incit[e]" the other inmates in Pod F to be "disruptive" and non-cooperative.

Later in the lunch hour, during one of the "moment[s]" when Henley appeared to be "settled down," petitioner decided to move Henley to a different pod for fear that it "was likely" that Henley "might become disruptive again at a later time." Petitioner asked Henley to step outside the pod; Henley did not comply and instead asked "Why?" Petitioner reiterated, "[P]lease step outside," and explained, "I'd like to talk to you"; Henley once again did not comply, and instead responded, "I can hear you from [t]here." When petitioner told Henley that he could not hear what Henley was saying, Henley said, "Oh" and stepped out of Pod F and into the staging area out in front of Pod F. Petitioner asked Henley to sit on a bench, and he complied.

At that point, petitioner called Sgt. Cardenas for assistance in moving Henley to a different pod, explaining that he was "having a problem with that same inmate [he] had earlier." When petitioner told Henley that he had called a sergeant for assistance in moving Henley to a different cell, Henley suddenly became very irate. As he gestured with his arms, Henley said in a loud voice, "Mother fucker, your [s]ergeant ain't but a fucking bitch" who "takes it up the ass." Henley also said that "[inmates] run this mother fuckin' place, not you." Henley then threw the bologna sandwich he was holding onto the floor, exclaiming, "You ain't shit, just like this mother fucking sandwich."

Overhearing Henley's outburst, Deputy Enrique Isidoro (Deputy Isidoro) came over to the staging area to stand next to petitioner, who was by that time sitting atop a counter at the other end of the staging area. Petitioner told Deputy Isidoro that he had called a sergeant to help with a recalcitrant inmate. Moments later, an inmate worker (called a "trusty") walked by and, seeing the discarded sandwich, picked it up and tossed it into a nearby trash can. Henley then screamed at the trusty, "Hey, mother fucker[,] that's my mother fuckin[']] food." Henley then pantomimed as if he were going to throw his juice box at the trusty. Petitioner warned him, "Don't do [it]," but Henley tossed the juice box toward the trusty (but missed).

At that moment, petitioner hopped off the counter and took his OC pepper spray out of his utility belt. With Deputy Isidoro a step behind him, petitioner crossed the staging area toward Henley and told Henley to get on the floor. Upon seeing petitioner with the pepper spray, Henley remained seated on the bench, raised his arms into the air, and turned his body away from petitioner and Deputy Isidoro. Petitioner nevertheless

sprayed Henley in the face. Henley then got down on the ground, but petitioner continued spraying him. Henley was then handcuffed.

Surveillance video captured the entire interaction between petitioner and Henley in the staging area from multiple angles.

### C. *Prior discipline*

In March 2012, the Department issued a written reprimand to petitioner for a July 2011 incident because he had questioned an inmate without asking for back-up and ended up in a situation in which he pushed the inmate up against a wall / glass window. In May 2012, the Department suspended petitioner for one day because he escorted a recalcitrant inmate without first calling a supervisor for back-up and ended up in a situation in which he used a rear wrist-lock against the inmate. Petitioner has also been disciplined for (1) a May 2003 use of force (a wrist lock) against a hospital patient without any justification, for which discharge was recommended but not implemented; (2) an October 2002 inadvertent failure to report the use of force; and (3) a July 2011 absence from work without excuse.

## II. Procedural Background

### A. *Administrative proceedings*

#### 1. *Charges*

After an internal affairs investigation, the Department on July 10, 2015 sent petitioner a letter of intent to terminate him. After considering his response to that letter, the Department on July 7, 2015, sent a letter discharging petitioner as of July 2, 2015.

In both letters, the Department alleged that petitioner "failed to perform [his] duties in a manner which would tend to establish and maintain the highest standard of efficiency in

carrying out the functions and objectives of the Department, and/or unnecessarily put [himself] and [his] partners in harm's way when [he] [(1)] removed a recalcitrant inmate . . . from a more secure area (Pod "F") to a less secure area ('Staging Area') without the presence of a sergeant, and/or [(2)] failed to make reasonable efforts to de-escalate a situation and/or [(3)] used force which was unnecessary and/or excessive given the totality of the circumstances presented." The Department further alleged that this conduct violated three provisions of the Department's Manual of Policy and Procedures: (1) Section 3-01/050.10 Performance to Standards, (2) Section 3-01/030.10 Obedience to Laws, Regulations and Orders by violating Custody Division Manual (a) section 5-05/090.05 Handling Insubordinate, Recalcitrant, Hostile or Aggressive Inmates and/or, (b) section 3-02/035.05 Force Prevention Policy, and (3) Section 3-10/030.00 Unreasonable Force. As the Department's decision-maker later explained, the Department selected discharge as the penalty because petitioner's disciplinary history showed a "pattern" that petitioner had once again repeated here.

2. *Administrative hearing*

Petitioner challenged his discharge, so the Los Angeles County Civil Service Commission (the Commission) appointed a hearing officer, who then conducted a five-day evidentiary hearing between March and July 2016. The Department called four witnesses: Sgt. Cardenas, the Department's decision-maker regarding the discharge, the Department's internal affairs investigator, and a Department official to testify about petitioner's disciplinary history. Petitioner called three: Deputy Isidoro, himself and a use of force expert. The Department called a use of force counter-expert in rebuttal.

The hearing officer issued a 28-page order recommending that the Commission uphold most of the charges and the penalty of discharge.[1] The officer concluded that Henley's "behavior met the test for being recalcitrant, insubordinate, hostile and aggressive" and that petitioner had violated the Department's recalcitrant inmate policy because he "knew [Henley] was recalcitrant at the time he removed him from the module" but "fail[ed] to wait for a sergeant prior to" doing so. The officer noted petitioner's "proffered explanation" but found that it was "not the whole story." The officer further concluded that petitioner had "used unnecessary and therefore excessive force" because the video showed that "there was no need for [petitioner] to use any force at all since it is clear that . . . Henley was complying with orders to go down to the floor and was not posing a threat to any deputy or other persons in the area." The officer lastly concluded that discharging petitioner was "justified" in light of his "record of prior discipline" and that this record was "sufficient to constitute that the principles of progressive discipline have been met."

3. *Commission adoption of hearing officer's recommendation*

After entertaining petitioner's objections to the hearing officer's recommendation, the Commission overruled those

---

1 The Department had also alleged that petitioner had violated the above stated rules by "engaging in banter and/or conversation with" Henley, but that allegation was not discussed as justification for petitioner's discharge by the decision-maker and thus not evaluated by the hearing officer.

objections, adopted the hearing officer's recommendation and discharged petitioner.

**B. *Writ proceedings***

Petitioner filed a petition for a writ of administrative mandamus seeking to overturn the Commission's ruling. He named the Department and the County of Los Angeles as real parties in interest.

Following full briefing, the trial court issued a 17-page order denying the writ petition.

Recognizing that petitioner had a fundamental vested right in his continued employment with the Department, the court applied its independent judgment to assess whether the "weight of the evidence" supported the Commission's findings of misconduct. The court ruled that the "[w]eight of the [e]vidence" supported the finding that petitioner violated the Commission's recalcitrant inmate policy (and thus violated the Obedience to Laws and Performance to Standards Policies) because Henley was "'verbally defiant'" to petitioner when initially refusing to step out of Pod F and because Henley had been recalcitrant the whole day, which was the very reason *why* petitioner had wanted to move Henley to a different Pod. The court further ruled that the "weight of the evidence" supported the finding that petitioner used unreasonable force (and thus violated the Use of Force, Obedience to Laws and Performance to Standards Policies) because the video showed that, once petitioner approached with the pepper spray out, Henley "[a]t no point" stood up and instead "immediately raised his hands in a position of surrender" and "turned to the side." The court found petitioner's testimony that he "'perceived'" Henley to be standing up to be "not supported by the record" and, in fact, "directly contradicted by the video

evidence." The court was also "not persuaded" by petitioner's use-of-force expert.

The court finally concluded that the Commission had not abused its discretion in imposing discharge as the penalty. After reviewing petitioner's disciplinary history, the court observed that his "disciplinary history shows that he was disciplined for similar behavior on two prior occasions." "Despite these prior forms of progressive discipline," the court noted, petitioner "nevertheless committed a very similar violation in this case," such that discharge was not an arbitrary penalty.

Following the entry of judgment, petitioner timely filed this appeal.

## DISCUSSION

Petitioner argues that the trial court erred in denying his petition for administrative mandamus. A person aggrieved by administrative acts may file such a writ to invalidate that act. (Code Civ. Proc., § 1094.5, subd. (a).) As pertinent here, a writ will issue if the administrative agency has committed a "prejudicial abuse of discretion." (*Id.*, subd. (b).)

### I. Substantial Evidence Supports the Trial Court's Findings That Petitioner Violated Multiple Department Policies

Where, as here, a person's fundamental vested rights are at issue, the trial court is to exercise its independent judgment in evaluating the evidence presented to the administrative agency and our task is to assess whether *the trial court's findings* are supported by substantial evidence. (*Bacilio v. City of Los Angeles* (2018) 28 Cal.App.5th 717, 723.) In assessing whether substantial evidence exists, we must construe the evidence in the light most favorable to the trial court's findings by resolving all conflicts and drawing all inferences in support of those findings.

(*Jackson v. City of Los Angeles* (2003) 111 Cal.App.4th 899, 902 (*Jackson*).)

Although the Department alleged that petitioner violated three different Department policies (Performance to Standards, Obedience to Laws, Regulations and Orders, and Force Prevention), those allegations ultimately turn on two factual questions: (1) Did petitioner violate the Department's recalcitrant inmate policy, and (2) did petitioner violate the Department's use of force policy? That is because the Department alleged petitioner's violation of the recalcitrant inmate policy as the first basis for the alleged violation of the Obedience to Laws, Regulations and Orders Policy and because the Performance to Standards Policy similarly turns on a deputy's "failure to conform to work standards."[2] And it is because the Department alleged petitioner's violation of the use of force policy as a second basis for the alleged violation of the

---

2 In pertinent part, the Obedience to Laws, Regulations and Orders Policy provides that "[m]embers who violate any rules, regulations or policies of the Department . . . shall be subject to disciplinary action."

In pertinent part, the Performance to Standards Policy provides that "[m]embers shall" (1) "maintain sufficient competency to properly perform their duties and assume the responsibilities of their position," (2) "perform their duties in a manner which will tend to establish and maintain the highest standard of efficiency in carrying out the functions and objectives of the Department," and (3) not "[f]ail[] to conform to work standards established for the member's rank or position."

Obedience to Laws, Regulations and Orders Policy as well as the Performance to Standards Policy, and because the Unreasonable Force Policy and Force Prevention Policy both require a deputy to "use only that force which is objectively reasonable."[3]

**A. *Recalcitrant inmate policy***

The Department's Policy on Recalcitrant Inmates provides that, absent "the imminent threat of physical injury or the need for immediate intervention," a deputy "shall request the presence of appropriate back-up and a sergeant or supervising line deputy, prior to handling any recalcitrant inmate." The Policy defines "[a]n insubordinate or recalcitrant inmate" as "any inmate who displays any of the following characteristics": (1) "[i]s continually verbally defiant," (2) "[u]ncooperative to any verbal commands

---

3 The Force Prevention Policy provides that "Department members shall only use that level of force which is objectively reasonable to uphold safety in the jails and should be used as a last resort. Reasonable efforts, depending on each situation, should be made by jail personnel to de-escalate incidents by using sound verbal communications when possible."

The Unreasonable Force Policy provides that "Department members shall use only that force which is objectively reasonable. Unreasonable force is that force that is unnecessary or excessive given the totality of the circumstances presented to Department members involved in using force. Unreasonable force is prohibited. The use of unreasonable force will subject Department members to discipline and/or prosecution. NOTE: The basis for determining whether force is 'unreasonable' shall be consistent with the Supreme Court decision of *Graham v. Connor*, 490 U.S. 386 (1989)."

given by personnel," (3) "[d]isplays aggressive, assaultive, hostile, or violent behavior toward personnel or other inmates," or (4) "[p]assively resists the efforts of personnel by ignoring commands or not acknowledging their presence."

Substantial evidence supports the trial court's finding that petitioner violated the Policy on Recalcitrant Inmates. It is undisputed that petitioner did not call for Sgt. Cardenas until *after* "handling" Henley by asking him to exit Pod F. More to the point, substantial evidence supports the trial court's finding that Henley was "recalcitrant." By that time, Henley had disobeyed the order to line up to go to court, had disobeyed the order to put on his shirt and line up near the staircase at the outset of the lunch hour, had "egged on" and "incited" other inmates to be disobedient, and had twice disobeyed petitioner's order to step out of the cell toward the end of the lunch hour. This constitutes behavior that is "continually verbally defiant," that is "uncooperative to . . . verbal commands," and that is "aggressive."

Petitioner raises what boils down to three arguments in response.

First, he argues that an inmate's recalcitrance has to be adjudged on a moment-by-moment basis and that Henley was not recalcitrant "at th[e] particular moment" petitioner asked him to step out of Pod F.[4] Substantial evidence does not support this position. Sgt. Cardenas, the Department's head decision-maker and the internal affairs investigator each testified that although

---

4 For the first time at oral argument, petitioner argued that none of Henley's actions after his refusal to line up to attend court constitutes recalcitrance. Like the trial court, we reject this argument as unsupported by either the facts or the law.

an inmate who is recalcitrant will at some point lose that status, an inmate like Henley who is "recalcitrant one second" and "cooperative the next" still qualifies as recalcitrant. Recalcitrance entails "not just one snapshot" but instead the "totality of the[] whole contact" between the inmate and deputy. Because the testimony of any *one* of these witnesses constitutes substantial evidence (*People v. Lewis* (2001) 25 Cal.4th 610, 646 ["The testimony of a single witness . . . can constitute substantial evidence . . . ."]), the testimony of all three certainly qualifies. Indeed, petitioner himself subjectively appreciated the danger that Henley might go from relative calm to open defiance, as that was the precise reason petitioner offered for wanting to move Henley to a different pod. Petitioner also admitted that Henley had been "verbally recalcitrant . . . pretty much the whole time during [petitioner's] contact" albeit with interspersed moments of calm. And to the extent petitioner is asserting that the Policy itself must be construed as a matter of statutory interpretation to mandate a moment-by-moment "snapshot" approach to evaluating recalcitrance, that assertion is one we independently review (*Jackson*, *supra*, 111 Cal.App.4th at p. 902 [de novo review of questions of law]) and independently reject. Petitioner's proffered construction would all but gut the Policy if a deputy could ignore prior, open defiance just because an inmate is momentarily calm. We decline to construe the Policy to lead to such an absurd result. (*People v. Jenkins* (1995) 10 Cal.4th 234, 246 [requiring courts to "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences."] (*Jenkins*).)

Second, petitioner asserts that the Policy does not define recalcitrance to include an inmate's conduct in "inciting" or "egging on" other inmates to be defiant. We beg to differ. Encouraging other inmates to be defiant and to ignore the verbal commands of deputies qualifies as being "uncooperative to any verbal commands" and "displaying aggressive . . . [and] hostile . . . behavior toward personnel." Further, because the Policy also reaches an inmate's "passive resistance[]," we do not know why it would exclude an inmate's active encouragement of others to be recalcitrant. We accordingly decline to construe the Policy to exempt those who openly aid and abet defiance, as doing so would defeat the purpose of the Policy and, again, lead to an absurd result. (*Jenkins*, *supra*, 10 Cal.4th at p. 246.) It is also of no consequence in this case where Henley also repeatedly engaged in defiant behavior himself.

Third, petitioner attacks several pieces of evidence. As a global matter, these attacks fail because substantial evidence review obligates us to construe the evidence in the light most favorable to the trial court's findings and to "disregard[]" "all contrary evidence." (*Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 388, fn. 9.) Petitioner's specific attacks do not in any event undermine the substantiality of the evidence supporting the trial court's findings. Petitioner notes that Sgt. Cardenas initially said "maybe . . . an hour" separated petitioner's first call about Henley's refusal to go to court and petitioner's second call about moving Henley to a different cell, and asserts this was incorrect. Petitioner is right, but ignores that Sgt. Cardenas on cross-examination admitted he was wrong about the time gap and that the gap was five hours and ignores that the trial court's finding noted the correct, five-

hour gap. Petitioner next asserts that he made *two* calls to Sgt. Cardenas about moving Henley during the lunch hour. This assertion rests on a creative construction of Deputy Isidoro's testimony, and not on anything Sgt. Cardenas or petitioner himself ever stated: Both participants to the interaction said there was only *one* call. The trial court was entitled to credit that evidence. Petitioner also says that Deputy Isidoro's testimony was "inconsistent, and appears confused." We must decline petitioner's invitation to second-guess the trial court's credibility calls. (*Barboni v. Tuomi* (2012) 210 Cal.App.4th 340, 349.)

**B. *Use of force policies***

As noted above, the Department's Force Prevention Policy and Unreasonable Force Policy each sanction the use of "only that force which is objectively reasonable." This standard looks to the "totality of the circumstances" and borrows the definition of "unreasonable" from *Graham v. Connor* (1989) 490 U.S. 386 (*Graham*).

Substantial evidence supports the trial court's factual finding that petitioner used force that was objectively unreasonable, thereby violating each of these policies. *Graham* adjudges "reasonableness" from "the perspective of a reasonable officer on the scene." (*Graham*, *supra*, 490 U.S. at p. 396.) Although Henley engaged in assaultive behavior toward the inmate trusty when Henley threw his juice box toward him, the video shows Henley remaining seated on the bench, immediately putting his hands up and turning away as soon as petitioner hopped off the counter and he and Deputy Isidoro crossed the staging area toward Henley. Because Henley had backed down before petitioner deployed his OC spray, petitioner's use of that spray was objectively unreasonable. Further, Sgt. Cardenas and

the Department's decision-maker testified that, in their expert opinion, petitioner's use of force was unnecessary and hence excessive and unreasonable.

Petitioner makes two categories of arguments in response.

First, he asserts that he "perceived" and "sensed" Henley to be "motion[ing] like he was going to" stand up. Because *Graham* looks to what is *reasonable* and because reasonableness tolerates some mistakes (*Heien v. North Carolina* (2014) 135 S.Ct. 530, 536 ["mistakes of fact can be reasonable"] (*Heien*)), petitioner reasons, his mistaken perception is not unreasonable and thus cannot be an unreasonable use of force. Petitioner concludes that his own *subjective* perception is so important that the video of the incident is wholly irrelevant. Petitioner is wrong. His argument ignores that only *reasonable* mistakes are excusable. (*Heien*, at p. 536 ["The limit is that 'the mistakes must be those of reasonable men.'"].) Unreasonable mistakes are by definition not "objectively reasonable"; to hold otherwise is to turn *Graham* into a *subjective* standard in contravention of its "solely" "objective" test. (*Id.* at 539; *Kingsley v. Hendrickson* (2015) 135 S.Ct. 2466, 2473.) Critically, petitioner's misperception of Henley's actions was not a reasonable mistake. His perception of events is flatly refuted by the video, as petitioner himself acknowledged when, after viewing the video for the first time, he frankly admitted that he was "shocked" to see what the video depicted and said, "I feel like maybe I wasn't even there." *Graham*'s objective reasonableness standard is meant to give some leeway to the "split-second judgments" that law enforcement officers are required to make in "tense, uncertain, and rapidly evolving" situations (*Graham*, *supra*, 490 U.S. at 397), but it cannot be

read to excuse the use of force based on perceptions that bear no resemblance to reality.

Second, petitioner contests the trial court's interpretation of some of the evidence. He argues that Deputy Isidoro testified that Henley was standing up (rather than seated on the bench) when petitioner and Deputy Isidoro crossed the recreational area. He also argues that he testified that he ordered Henley to the ground and only pepper sprayed him when he did not immediately comply with that order. These arguments are irrelevant because the video and testimony of other witnesses contradicts Deputy Isidoro and petitioner on these points. As noted above, we must credit the evidence that supports the trial court's findings.

**II. The Commission Did Not Abuse Its Discretion In Selecting The Penalty of Discharge**

We independently review the trial court's determination as to whether the Commission abused its discretion in selecting one penalty over another. (*Cassidy v. California Bd. of Accountancy* (2013) 220 Cal.App.4th 620, 627.)

The trial court did not abuse its discretion in selecting the penalty of discharge for what is, in essence, petitioner's third incident involving an interaction with an inmate without proper back-up that led to a use of force. The prior discipline of a written reprimand and a one-day suspension did not deter petitioner from engaging in the same dangerous behavior yet again. In light of this "pattern," the penalty of discharge was well within the Commission's discretion.

Petitioner raises five arguments to the contrary.

First, he argues that the Commission ignored the Department's requirement that discipline be progressive. This argument overlooks the hearing officer's finding that the penalty

of discharge *did* comply with the doctrine of progressive discipline. It also overlooks the record demonstrating prior similar acts leading to discipline and the Department's decision-maker's testimony that he perceived precisely this "pattern" and that "there had [not] been any change in [petitioner's] decision[] with respect to force, notwithstanding [the prior] significant discipline." And contrary to what petitioner suggests, it is "not necessary" for the Department "to have imposed each lower step of discipline prior to imposing a given level."

Second, petitioner contends that the Commission lacked authority to impose the penalty of discharge because the maximum penalty for the two subsidiary violations making up the Performance To Standards and Obedience To Laws Policies—namely, the recalcitrant inmate policy and use of force policy as to OC spray—was less than discharge. Petitioner is correct that these subsidiary violations had lesser maximum penalties, but this is irrelevant. The Performance To Standards and Obedience To Laws Policies were enacted to grant the Department the flexibility to impose greater discipline upon an employee, like petitioner, with multiple prior violations that would otherwise not be taken into account by the present violation alone.

Third, petitioner asserts that the penalty of discharge is inconsistent with the factors for imposing discipline articulated in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 218. Those factors are: (1) "the extent to which the employee's conduct resulted in, or if repeated is likely to result in, '[harm] to the public service,'" (2) "the circumstances surrounding the misconduct," and (3) "the likelihood of its recurrence." (*Ibid.*) These factors support discharge in this case. Petitioner's pattern of engaging in risky behavior by handling inmates when he

should have back-up and then resolving that risk by engaging in the use of force harms the public service by subjecting these inmates to needless injury and where, as here, petitioner's needless use of force is undertaken in view of dozens of other inmates, his conduct poses grave risks to the Department's ability to maintain cooperative and peaceable relationships with the inmates it is tasked to police. Given that this is petitioner's third such incident, this risk and the resulting injuries are likely to recur. Further, the circumstances are entirely avoidable but petitioner has demonstrated a desire not to avoid them.

Fourth, petitioner posits that he should not be discharged because, in the 11-plus months that the Department investigated his misconduct before discharging him, he had no further disciplinary problems. This ignores that the Department had one year to investigate and bring the charges. (Gov. Code, § 3304, subd. (d)(1).) We decline to adopt a rule that precludes a public agency from imposing the maximum penalty because it conducts a thorough investigation and then complies with the law in filing disciplinary charges.

Lastly, petitioner insists that his prior discipline while working at OPS should not form part of his disciplinary record with the Department, because it is unclear whether the Department and OPS employed similar standards. We need not respond to this argument because we affirm the trial court's ruling upholding discharge based, with respect to petitioner's disciplinary history, on the two prior incidents occurring when petitioner was employed by the Department itself.

**DISPOSITION**

The judgment denying the writ is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST